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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Part 1 of the	)	WT Docket No. 97-82
Commission's Rules —	)	
Competitive Bidding Proceeding	)	

To: The Commission

COMMENTS OF
COOK INLET REGION, INC.

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Dated: March 27, 1997

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SUMMARY

Cook Inlet Region, Inc. ("CIRI") urges the Commission to codify a responsible and responsive small business auction program in its Part 1 auction rules. As part of this program, the Commission should establish attribution and affiliation rules that provide continued certainty for potential small bidders. In particular, CIRI urges the Commission to clarify the types of small business-investor relationships that would be appropriate in a more relaxed attribution scheme. The Commission also should outline the effect of recognized minority investor protection provisions in such a scheme, and establish a process by which potential small business bidders could receive guidance regarding contemplated business relationships.

CIRI also urges the Commission to include its tribal affiliation exemption among its Part 1 affiliation rules. The Commission developed the tribal affiliation exemption to mirror the Small Business Administration ("SBA") rules that are the foundation of its auction preference program, and consistently has reaffirmed the exemption since then. The SBA also just completed an overhauled of its various small business programs and expressly preserved the tribal affiliation exemption on which the Commission's rule is based. The Commission applied the exemption in 1994, 1995, 1996, and 1997; there is no reason to change that course here.

With regard to specific small business preferences, CIRI again suggests to the Commission that set aside blocks and

installment payment plans may no longer be responsible small business provisions. Smaller businesses should be equipped to compete in all auctions, not just set aside programs. More importantly, the availability of credit without a determination of credit-worthiness may undermine the effectiveness of the Commission's small business policies. CIRI urges the Commission to adopt a heightened small business bidding credit in lieu of deferred payment options.

If the Commission continues to offer installment payment plans, the Commission should require prospective small business licensees to certify their current ability to satisfy their first year of installment payment obligations. Too many times, smaller businesses have bid in Commission auctions with the expectation of securing subsequent public market financing. Government financing should not be extended on that basis. Prospective installment plan beneficiaries should be required to demonstrate credit-worthiness and should certify the current ability to satisfy at least the first year of payment obligations.

Finally, CIRI urges the Commission strictly to monitor requests for grace period relief; such relief is an extraordinary remedy and should not be automatic. Moreover, CIRI supports the Commission's proposal to cross default licenses for which bidders fail to pay. With a cross default policy, the Commission will encourage bidders to speculate during an auction and to cherry-pick desired licenses thereafter. Neither incentive should be part of a responsible small business auction program.

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To: The Commission

COMMENTS OF COOK INLET REGION, INC.

Cook Inlet Region, Inc. ("CIRI"), pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, submits these Comments in response to the captioned Notice of Proposed Rule Making ("NPRM"), adopted by the Commission on February 20, 1997, and released on February 28, 1997.

I. INTRODUCTION

CIRI has long been an active supporter of responsibly managed government efforts to encourage minority and small business participation in the communications industry. Since the advent of the Commission's spectrum auction proceedings, CIRI has been a strong proponent of what became the Commission's entrepreneurs' block rules. In Comments and Reply Comments[1] in PP Docket 93-253, for example, CIRI demonstrated that preferences to assist businesses owned by members of minority groups would survive the intermediate scrutiny analysis then called for under

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1. Comments of Cook Inlet Region, Inc., PP Docket No. 93-253 (submitted Nov. 10, 1993); Reply Comments of Cook Inlet Region, Inc., PP Docket No. 93-253 (submitted Nov. 30, 1993).

Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 564 (1990).[2] In a Written Statement to the Commission's personal communications service ("PCS") Task Force in April, 1994, CIRI demonstrated the need for preferential measures and submitted statistical data illustrating the lack of minority participation in the telecommunications industry.[3] Similarly, CIRI Senior Vice President Margaret Brown testified before the Subcommittee on Minority Enterprise, Finance and Urban Development in May, 1994, about the problems that plague Native Americans in particular and the need for preferential measures in the telecommunications industry for members of minority groups.[4] Most recently, CIRI urged the Commission to increase opportunities for responsible small bidders in the remaining broadband PCS auctions and the auction of Wireless Communications Service ("WCS") spectrum.[5]

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2. See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Second Report and Order, 9 FCC Rcd 2348, 2398-2400 (1994) (citing CIRI constitutional analysis of minority preferences).

3. Written Statement of Cook Inlet Region, Inc., GEN Docket 90-314 (submitted April 22, 1994) (with twelve attachments).

4. Discrimination in the Telecommunications Industry: Hearing Before the Subcomm. on Minority Enterprise, Finance, and Urban Development of the House Comm. on Small Business, 103rd Cong., 2d Sess. 55-56 (1994) (statement of Margaret Brown, Senior Vice President, Cook Inlet Region, Inc.). Ms. Brown's testimony was filed with the Commission by Chairman Mfume on May 31, 1994 and was cited by the Commission in its Order on Reconsideration in PP Docket 93-253. See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Order on Reconsideration, 9 FCC Rcd 4493, 4494 n.13 (1994) ("Order on Reconsideration").

5. Comments of Cook Inlet Region, Inc., WT Docket No. 96-59 (submitted Apr. 15, 1996); Reply Comments of Cook Inlet Region, Inc., WT Docket No. 96-59 (submitted Apr. 25, 1996); Comments of

Against this background, CIRI strongly urges the Commission to codify opportunities for small businesses in its generic Part 1 spectrum auction rules. The Commission itself will create barriers to entry if it limits the designated entity programs mandated by Congress in Section 309(j). CIRI agrees with the Commission's frequent determinations that small business preferences also frequently aid minority and women-owned businesses without raising substantial constitutional implications, and CIRI urges the Commission to codify such preferences here. Well-crafted small and minority-owned business opportunities will genuinely help the Commission to reduce barriers to entry to emerging services without sacrificing value in the auction context or affecting the rapid development of new services. CIRI urges the Commission to codify a responsible — and responsive — small business auction program in its Part 1 auction rules.

II. ATTRIBUTION AND AFFILIATION RULES

A. The Commission's Attribution and Affiliation Rules Should Provide Certainty for Small Business Applicants

At the core of this responsible small business auction policy is the Commission's effort to increase opportunities for small businesses to attract the capital necessary to compete against more entrenched companies. To that end, the Commission developed its broadband PCS control group structures to permit a small business to attract capital without turning control of the

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Cook Inlet Region, Inc., GN Docket No. 96-228 (submitted Dec. 4, 1996).

auction applicant to nonqualifying entities. The Commission identified certain required levels of ownership and control by small businesses — and permissive levels of ownership by others — and effectively established a safe-harbor for small business auction participation.

An important byproduct of this control group structure was certainty. As the Commission wrote in 1994:

> In adopting these affiliation rules, we emphasize that these rules will not be applied in a manner that defeats the objectives of our attribution rules. . . . [S]o long as the requirements of our attribution rules are met, the affiliation rules will not be used to defeat the underlying policy objectives of allowing such passive investors. More specifically, if a control group has de facto and de jure control of the applicant, we shall not construe the affiliation rules in a manner that causes the interests of passive investors to be attributed to the applicant.[6]

The Commission later articulated certain guidelines for identifying de facto control of an applicant by a control group.[7]

If the Commission elects to "use a controlling interest threshold to determine whether an entity qualifies to bid as a small business"[8] in its Part 1 Rules, CIRI urges the Commission to do so in a way that provides continued certainty for potential small bidders. First, CIRI urges the Commission further to clarify the types of small business-investor relationships that

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6. Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Fifth Report and Order, 9 FCC Rcd 5532, 5620 (1994) ("Fifth Report and Order").

7. Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Fifth Memorandum Opinion and Order, 10 FCC Rcd 403, 447 (1994) ("Fifth MO&O").

8. NPRM at ¶ 28.

would be permitted in a more general attribution scheme. This is particularly important where small businesses might consider entering into management agreements, brand-name arrangements, loan facilities, or other relationships with current or potential investors. A more relaxed attribution regime might have the effect of driving potential investors away if the requirements of the law are not readily-discernable.

Second, CIRI urges the Commission to clarify the effect of recognized provisions benefitting limited partners in the small business de jure and de facto control standard. In another context, the Commission has written:

> While the [Revised Uniform Limited Partnership Act] specifies that a limited partner can participate in any of the 'safe harbor' activities enumerated in that model statute without being deemed to have taken part in the 'control' of the business, it is clear that exercise of many of these activities could involve the limited partner in the affairs of the partnership to a far greater degree than is appropriate for one who has been granted a total exemption from attribution on the basis of the 'passive' nature of his or her equity holdings.[9]

Yet, in the broadband PCS Fifth MO&O, the Commission indicated that "certain provisions benefitting non-majority investors" might be found to deprive the control group of de facto control, "particularly if the terms of such provisions vary from

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[9] Corporate Ownership Reporting and Disclosure of Broadcast Licenses, FCC 85-252, 58 RR2d (P & F) 604, 616 (1985) (footnote omitted).

recognized standards."[10] The Commission cited the Uniform Limited Partnership Act as one such recognized standard.[11]

Finally, CIRI urges the Commission to establish a relatively low-cost mechanism by which prospective small business auction participants could secure some pre-auction confirmation of compliance with the Commission's Rules. CIRI recognizes that attribution and control determinations frequently turn on a consideration of the totality of the circumstances in a given business relationship. Nevertheless, CIRI encourages the Commission to make fact-specific business structure guidance available as a means to encourage investment in small business ventures.

B. The Commission Must Include Its Tribal Affiliation Exemption Among Any Small Business Provisions

In connection with its general affiliation discussion, the Commission requests comment on whether to include its tribal affiliation exemption in the definition of affiliate set forth in Part 1.[12] CIRI strongly urges the Commission to do so. The tribal affiliation exemption established by the Commission for broadband PCS[13] and for WCS[14] is an important part of the Commission's small business auction policy. The Commission

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10. Fifth MO&O, 10 FCC Rcd at 449 (footnote omitted).

11. Id. at 449 n.190.

12. NPRM at ¶ 29.

13. 47 C.F.R. § 24.720(l)(11)(i).

14. 47 C.F.R. § 27.210(b)(3)(ii).

developed the tribal affiliation exemption to ensure that its small business rules are consistent with those of the Small Business Administration ("SBA"). In the instant proceeding, the Commission proposes to rely substantially on the SBA's small business rules and determinations, and the tribal affiliation exemption is an meaningful and enduring element of that regime.

Specifically, federal law directs the SBA to calculate the "size" of any entities owned by an Indian tribe "without regard to its affiliation with the tribe, any entity of the tribal government, or any other business enterprise owned by the tribe . . . ."[15] Pursuant to the direction of Congress, the SBA's Rules provide that, for size determination purposes, "concerns owned and controlled by Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601) . . . are not considered affiliates of such entities, or with other concerns owned by these entities solely because of their common ownership."[16] The same exemption is included in the SBA's size standard guidelines for its 8(a) Program.[17]

As part of its detailed use of these SBA standards in the broadband PCS context, the Commission adopted its tribal affiliation exemption in 1994 to "mirror[] this congressional

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15. 15 U.S.C. § 636(j)(10)(J)(ii)(II).

16. 13 C.F.R. § 121.103(b)(2) (1996).

17. 13 C.F.R. § 124.112(c)(2)(iii) (1996).

mandate."[18] Since then, the Commission consistently has reaffirmed the tribal affiliation exemption. In particular, the Commission has made clear that its tribal affiliation exemption is unaffected by the Supreme Court's decision in Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995),[19] reapplying the exemption three times since the Court's 1995 ruling.[20] The SBA also just completed a comprehensive, post-Adarand overhaul of its small business affiliation rules in which it retained the tribal affiliation exemption on which the Commission's rule is based.[21]

Against this background, the Commission's Part 1 small business preference program must include the tribal affiliation exemption featured in Sections 24.720(l)(11)(i) and 27.210(b)(3)(ii) of the Commission's Rules. Discussing the SBA rules in 1994, the Commission noted that the employment of its own tribal affiliation exemption "is consistent with these other Federal policies and complies with the congressional mandate in

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18. Fifth MO&O, 10 FCC Rcd at 428.

19. CIRI is including as Exhibit 1 to these Comments a Memorandum further analyzing the Commission's Tribal Affiliation Rule in the wake of the Adarand decision.

20. See Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service, Report and Order, FCC 97-50, ¶ 195 (rel. Feb. 19, 1997) ("WCS Order"); Amendment of Parts 20 and 24 of the Commission's Rules - Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, 11 FCC Rcd 7824, 7842 (1996) ("D, E, F Block Order"); Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Sixth Report and Order, 11 FCC Rcd 136, 155-56 (1995) ("Sixth Report and Order").

21. See 61 Fed. Reg. 3280, 3287 (1996).

the auction law."[22] In 1995, the Commission explained that its "decision to exempt Indian tribes generally from our affiliation rules was premised on the fact that Congress has imposed unique legal restraints on the way they can utilize their revenues and assets."[23] In 1996, no party opposed the Commission's decision to apply its tribal affiliation exemption to the auction of broadband PCS F block spectrum.[24] And, in 1997, the Commission again made clear that application of its tribal exemption "is consistent with the treatment afforded such entities by the Small Business Administration's 8(a) program."[25]

Plainly, the same interests that justified the Commission's action in 1994 — and again in 1995, 1996, and 1997 — apply with equal force in this context. Pursuant to Section 309(j) of the Communications Act, the Commission continues to refine a system of competitive bidding to disseminate licenses among a wide variety of applicants, including — at a minimum — small businesses. Recognizing that the tribal affiliation exemption is an important part of the SBA's small business rules, the Commission developed and applied its tribal affiliation rule to be consistent with "these other Federal policies and . . . the

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22. Order on Reconsideration, 9 FCC Rcd at 4494 (footnotes omitted).

23. Sixth Report and Order, 11 FCC Rcd at 156.

24. D, E, F Block Order, 11 FCC Rcd at 7840-41.

25. See WCS Order at ¶ 195. The Commission also reiterated that the tribal exemption is appropriate "because of the general lack of availability of revenues from such entities for purposes of participation in WCS." Id.

congressional mandate in the auction law."[26] Nothing in the record since that determination has affected the validity of the Commission's judgment, and there is no cause for the Commission to depart from that judgment here.

III. SPECIFIC SMALL BUSINESS PREFERENCES

A. Set Aside Blocks and Installment Payments May No Longer Be Responsible Small Business Provisions

CIRI argued in the WCS rulemaking that set aside spectrum blocks and installment payment plan may no longer represent responsible small business provisions. Although CIRI has generally supported a full range of designated entity preferences for the Commission's spectrum auction process, CIRI urged the Commission to review its previous determinations in light of the experience gained in two years of auctioning spectrum. This rulemaking provides just such an opportunity.

With regard to set aside blocks, CIRI urges the Commission to "mainstream" the participation of smaller businesses by offering bidding credits in all spectrum blocks for all services. The Commission should not selectively remove barriers to entry to meaningful small business competition. If credit-worthy small businesses cannot compete for licenses in an open auction — even with Commission preferences — then the market will bear that out. If the Commission is concerned that some smaller businesses could not implement a capital-intensive service, then the Commission should limit the availability of auction preferences to smaller

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26. Order on Reconsideration, 9 FCC Rcd at 4494 (footnotes omitted).

businesses with particularly strong credit backgrounds. What the Commission should not do is to presume that a small business cannot compete in an open auction and then craft rules making that a reality.

With regard to installment payment plans, CIRI recognizes that the lack of access to capital frequently limits the ability of smaller businesses to compete with established telecommunications companies.[27] The Commission's installment payment plans were designed to help to overcome that limitation. However, the availability of free credit (i.e., financing available without a determination of the debtor's credit-worthiness) has fueled notable speculation in the designated entity auction context. The Commission and the Treasury Department must now administer substantial loans made to companies without a credit background. Unless the Commission is prepared to establish the credit-worthiness of installment payment applicants, CIRI urges the Commission to offer substantial bidding credits to small businesses in lieu of government financing.

In that regard, the Commission should employ the bidding credits that it developed in the WCS rulemaking. "Small businesses" — as they are defined in Section 27.210 of the Commission's Rules — should receive a 25 percent bidding credit to lower the cost of their winning bids and "very small

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27. NPRM at ¶ 34.

businesses" should receive a 35 percent bidding credit.[28] As the Commission wrote in the WCS rulemaking, "[t]hese levels reflect the thresholds used in the broadband PCS auction with a reasonable adjustment for the unavailability of installment payment plans for WCS licensees."[29] If installment payment plans no longer represent sound small business policy as a general matter, CIRI supports the Commission's determination that the participation of smaller businesses must be secured with a material increase in bidding credits.

B. If the Commission Offers Installment Payment Plans, It Should Confirm the Credit-Worthiness of the Debtors

If the Commission elects to continue to offer installment payment plans for small businesses, CIRI urges the Commission first to confirm the credit-worthiness of the prospective debtors.[30] In its D, E, F Block Order, the Commission raised the broadband PCS F Block auction upfront payment and downpayment requirements in part "to guard against default"[31] and in part to "increase the likelihood that licenses are awarded to parties who are best able to serve the public."[32] The Commission recognized that greater financial accountability was necessary "to deter

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28. See 47 C.F.R. § 27.209; WCS Order at ¶ 193.

29. WCS Order at ¶ 193.

30. Id.

31. D, E, F Block Order, 11 FCC Rcd at 7860.

32. Id. at 7861 (footnote omitted).

insincere and speculative bidding and to ensure that bidders have the financial capability to build out their systems."[33]

Nevertheless, the Commission cannot always predict the value of the licenses being auction, so it generally does not know the size of the loans being advanced until the auction is closed. The broadband PCS C block auction underscored this point. For this reason alone, the availability of future installment payment plans must be predicated on the credit-worthiness of the applicant. Specifically, CIRI urges the Commission to require each auction winner to file a sworn statement certifying that it possesses liquid assets sufficient to cover its first year of installment payment obligations. Particularly at the initial downpayment stage, a certification regarding the ability to make the initial installment payment (assuming the then-effective interest rate) could deter companies from bidding for licenses with an expectation of as yet unsecured public market financing to pay the way.

If a prospective licensee could not so certify, then the license grant should be denied or the installment payment offer should be rescinded. If the Commission utilizes the 20 percent downpayment that it employed for broadband PCS[34] and permits smaller businesses to pay interest obligations only for the first six years of the ten year license term, then requiring demonstration of the ability to pay the obligations of first year

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33. Id. at 7860 (footnote omitted).

34. D, E, F Block Order, 11 FCC Rcd at 7860.

would not be unduly burdensome. At bottom, the Commission's Rules should assist smaller businesses in attracting capital; they should not permit bidders to defer doing so until it is too late.

IV. PAYMENT ISSUES

A. The Commission Must Strictly Monitor Grace Period Requests

CIRI urges the Commission not to liberalize the award of grace period relief as proposed in the NPRM.[35] Providing automatic concessions to licensees who face the potential of default amounts to throwing good money after bad. Installment payment plan recipients almost necessarily do not possess the financial resources to pay for licenses outright and may not have been able to convince capital markets that they are an acceptable investment risk. Having made extremely high-risk business decisions, such entities may now want the government to bear the burden of that risk. Providing automatic payment relief only sets the Commission up for further compromises in the future.

Thus, CIRI urges the Commission strictly to monitor all requests for grace period relief, which cannot be done when relief is automatic following a penalty payment.[36] The availability of government financing is a privilege, not a right, and the public, Congress, and other bidders expect adherence to clear standards when it comes to repaying the government over a

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35. NPRM at ¶ 74.

36. Id.

ten year period. Clear standards do not exist in a system where each debtor effectively can establish its own grace period plan. The Commission — or the Treasury Department — must pass on all grace period requests to ensure that the public debt is satisfied now and will be satisfied later.

It is important to note that in a commercial setting, grace period relief is accompanied by a great many more burdens than a simple penalty of 15 percent of the overdue amount.[37] Commercial practice would demand higher overdue amount penalties, increases in equity contributions (e.g., paydown of 20 percent of the debt principal), interest rate step-ups, reduction of the amortization period, and establishment of genuine debt covenants (e.g., set debt-to-equity ratios). Grace period relief is an extraordinary remedy, and the Commission should not permit struggling licenses to rely on such relief as a matter of course. CIRI urges the Commission to facilitate the process of resolving licensee capital issues before payment due dates, but not at the expense of the public-funded debt.

B. Cross Default Provisions Will Avoid Selective Defaults

CIRI also urges the Commission to cross default its installment payment plan loans with other installment payment plan loans to the same licensee.[38] Without such a provision, the Commission will permit a licensee to select the licenses and markets on which it defaults, effectively rewarding the licensee

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37. See id. at ¶ 74.

38. Id. at ¶ 78.

with the ability to "save" only the licenses that it wishes to retain. The Commission should sanction neither bid speculation during an auction nor license "cherry-picking" thereafter, yet these would be the effects of maintaining a selective default policy.

Indeed, without a cross-default policy, a bidder that acquires a market that it does not truly desire simply may default on its payment obligations for that market while retaining the markets that it values more highly. With a cross-default provision, that same bidder might approach bidding with more circumspection, in the process leaving the subject market for a bidder that desires to provide service in the area. The Commission would be saved the expense of administering the default and relicensing of the area, and service may well be provided more quickly in the given market. The Commission could waive the cross-default policy in circumstances in which the public interest would be served, but bidders should not expect that default exists as a strategic bidding mechanism.

C. The Commission Must Make Licensee Payment Information, Histories, and Dispositions Available to the Public

Finally, CIRI urges the Commission to make all licensee installment payment information available to the public. This information includes payment terms and amounts, payment histories, and records of requests for or grants of any dispositions — such as grace period relief or debt compromise — affecting the installment loans. As noted above, the satisfaction of an installment plan obligation is a condition of

each FCC license, and each license is financed with taxpayer money. All other terms of the federal license are made public, and there is no reason why this newer obligation should be treated differently.

V. CONCLUSION

For these reasons, CIRI urges the Commission to adopt attribution and affiliation rules with certainty, including the Tribal Affiliation Exemption, to establish the credit-worthiness of prospective installment payment plan recipients, and to refine the Commission's payment rules to ensure timely and consistent satisfaction of the Nation's auction debt.

Respectfully submitted,

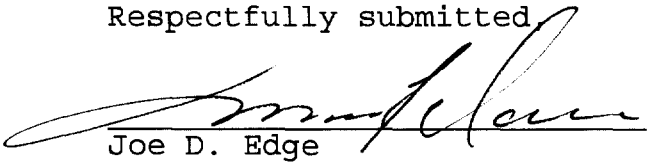

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EXHIBIT 1

PRESENTATION OF
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SUMMARY OF POINTS AND AUTHORITIES REGARDING TRIBAL AFFILIATION RULES IN LIGHT OF ADARAND

I. INTRODUCTION

By orders in August and November 1994, the Commission adopted the Tribal Affiliation Rule, which excludes from attribution for "size" purposes the revenues and assets of any affiliated Alaska Native Corporation or Indian Tribe. 47 C.F.R. § 24.720(l)(11)(i). As the Commission noted at the time, the Tribal Affiliation Rule is a congressionally-mandated element of the Small Business Administration's affiliation rules that were adopted by the FCC. The attribution exception reflects both Congress' express constitutional power to regulate in connection with Indian Tribes and the unique financial character of Native Corporations and Tribes imposed by federal law. As the Commission properly found when adopting the Rule, the unique financial restrictions imposed by law on Native Corporations and Tribes place them at a disadvantage in the Commission's auction vis-a-vis any other private corporation or racial group.

As we show below:

(1) the Tribal Affiliation Rule is constitutional and wholly unaffected by Adarand;

(2) the Tribal Affiliation Rule is an integral part of Congress' regulatory scheme for Native Corporations and Tribes;

(3) repealing the Rule would require further rule making proceedings;

(4) removal of the Rule is not supported by the record before the Commission; and

(5) a departure from the express congressional policy embodied in the Tribal Affiliation Rule (a) would subject the auction process to the substantial risk of delay and (b) would impose unique disadvantages on Native Corporations and Tribes.

II. THE COMMISSION'S TRIBAL AFFILIATION RULE IS NOT RACIAL AND IS NOT AFFECTED BY ADARAND

The "Indian Commerce Clause" of the United States Constitution provides Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Constitution, Article I, § 8, cl. 3. This separate, enumerated constitutional power has long been recognized to provide Congress plenary authority to deal with Native Americans in unique ways.

Nothing in Adarand is relevant to the Commission's Affiliation Rule for Native Corporations and Tribes. The basis for the rule is wholly unrelated to race. Indeed, two days after Adarand was decided, the Supreme Court unanimously reaffirmed one of the many special legal rules (there, a categorical immunity from certain State taxation) applicable to Indian Tribes and their members, but inapplicable to "non-Indians." See Oklahoma Tax Commission v. Chickasaw Nation, 63 U.S.L.W. 4594, 4596 (June 14, 1995).

Thus, the separate constitutional basis for the special treatment of Indian Tribes and Alaska Native Corporations remains beyond serious challenge. Justice Scalia, then writing for the majority of the D.C. Circuit, recognized that: "the constitution itself . . . 'singles Indians out as a proper subject for separate legislation,'" providing the constitutional basis for "rejecting equal protection challenges" to such legislation. United States v. Cohen, 733 F.2d 128, 139 (D.C. Cir. 1984) (en banc); Constitution, Article I, § 8, cl. 3; see also Treaty Concerning the Cession of Russian Possessions in North America, March 30, 1867, Article 3, 15 Stat. 539, 542.

Under long settled law, "Indian tribes are 'domestic dependent nations'" entitled to unique treatment, see, e.g., Oklahoma Tax Com'n v. Potawatomi Indian Tribe, 498 U.S. 505, 509-10 (1991) (Rehnquist, C.J. for a unanimous Court), and subject to special federal regulation, see, e.g., Chugach Alaska Corp. v. Lujan, 915 F.2d 454 (9th Cir. 1990) (affirming Secretary of Interior's regulation of Alaskan village membership).

Thus, "[f]ederal regulation of Indian tribes . . . is governance of once-sovereign political communities; it is not to be viewed as legislation of a '"racial" group consisting of "Indians."'" United States v. Antelope, 430 U.S. 641, 646 (1977) (Burger, C.J., for a unanimous court) (emphasis added).

> The decisions of this [Supreme] Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly

> provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with the Indians.

United States v. Antelope, 430 U.S. at 645 (emphasis added).

The Commission's Tribal Affiliation Rule is not a preference and not subject to equal protection analysis. The rule merely recognizes, and compensates for, the "unique legal constraints" that "Congress has imposed . . . on the way [Native Corporations and Tribes] can utilize their revenues and assets." Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Fifth Memorandum Opinion and Order, 10 FCC Rcd 403, 427 (1994) ("Fifth Memorandum Opinion and Order") (emphasis added). The Tribal Affiliation Rule is needed to level the playing field, and is not properly viewed as a "preference" because other persons and legal entities are not similarly situated -- i.e., they do not labor under the "strict alienability restrictions" that preclude Native Corporations "from two of the most important means of raising capital enjoyed by nearly every other corporation: (1) the ability to pledge stock of the company against ordinary borrowings, and (2) the ability to issue new stock or debt securities." Id. at 427-28 (emphasis added). Accordingly, the Tribal Affiliation Rule raises no equal protection issue both because the rule is not based on race, but on the unique status and legal burdens applicable to tribal entities, and because there is no other "similarly situated" group that is treated differently.

Moreover, even express employment preferences for Indians have been unanimously affirmed by the Supreme Court, on the ground that the preference was not for a "discrete racial group," but for "quasi-sovereign tribal entities." Morton v. Mancari, 417 U.S. 535, 554 (1974). Such legislation reflects "the unique legal relationship between the Federal Government and tribal Indians." Id. at 550. Under any different understanding of the law, "the solemn commitment of the Government toward the Indians would be jeopardized." Id. at 552.

Congress has long used its special constitutional powers regarding Indians "to promote the 'goal of Indian self-government, including its "overriding goal" of encouraging tribal self-sufficiency and economic development.'" Potawatomi Indian Tribe, 498 U.S. at 510.

As is noted below, Congress has used its power to mandate the very Tribal Affiliation Rule here at issue in order to promote tribal economic development. This express congressional statute, which the Commission's Affiliation Rule reflects, is specifically directed not at individual Native Americans, but at legal entities -- Indian Tribes and Alaska Native Corporations. There can be no question but that the creation of, and special rules applicable to, these entities are based not on race, but on a political resolution of issues uniquely consigned to Congress under the Constitution.